Filed 2/6/03 In re Juan C. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re JUAN C., a Person Coming Under the Juvenile Court Law. _____ THE PEOPLE, Plaintiff and Respondent, v. JUAN C., Defendant and Appellant.	B156830 (Super. Ct. No. VJ25395)

APPEAL from an order of the Superior Court of Los Angeles County, Steff Padilla, Judge. Affirmed and remanded with directions.

Sally P. Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Theresa A. Cochrane and Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

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Juan C., a minor, appeals from the order of wardship (Welf. & Inst. Code, § 602) entered following findings that he committed receiving stolen property (Pen. Code, § 496) and possession of a firearm by a minor (Pen. Code, § 12101, subd. (a)(1)). He was placed home on probation.

In this case, we hold appellant's statements to police were not obtained in violation of *Miranda v. Arizona*.[1] Appellant was not in custody at the time he was questioned, the question posed by a police officer was not interrogation, and, even if appellant's statements were the product of custodial interrogation, no Miranda violation occurred because the public safety exception to Miranda applied. We conclude there is no need to decide appellant's Penal Code section 654 contention, since the court ordered that appellant be placed home on probation and did not order that he be removed from the custody of his parents. We accept respondent's concession that remand is appropriate to permit the trial court to expressly and orally declare on the record whether the offense alleged in count two was a felony or misdemeanor. Finally, we hold the juvenile court properly imposed a probation condition prohibiting appellant from associating with anyone disapproved of by his parents or the probation officer.

FACTUAL SUMMARY

The record reflects that on September 5, 2001, appellant committed the above offenses in Bell.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

CONTENTIONS

Appellant contends: (1) "[a]ppellant's statement should have been excluded because it was obtained in violation of his *Miranda* rights when he was interrogated while in custody"; (2) "[a]ppellant cannot be sentenced separately for receiving stolen property and for possession of a firearm because the acts were part of an indivisible transaction; count II must be stayed pursuant to Penal Code § 654"; (3) "[t]he juvenile court erred by failing to declare whether the offense in count II was a felony or a misdemeanor; remand is necessary"; and (4) "[t]he probation condition prohibiting appellant from associating with anyone not approved of by the probation officer or his parents is overbroad and should be stricken."

DISCUSSION

1. *Appellant's Statements To Police Were Not Obtained In Violation of Miranda v. Arizona.*

    a. *Pertinent Facts*.

Appellant moved to suppress certain statements he made to police on the ground the statements were obtained in violation of his *Miranda*[2] rights. At the suppression hearing, Bell Police Detective Art Jimenez testified that at 11:30 a.m. on September 5, 2001, Jimenez responded to 6505 Flora in Bell. Jimenez spoke with Josefa C. and Carolina Rangel.[3] Jimenez then went directly across the street to 6502 Flora, the

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[2] *Miranda v. Arizona*, *supra*, 384 U.S. 436.

[3] Jimenez did not testify at the suppression hearing as to the relationship, if any, between Josefa C., Rangel, and/or appellant.

residence of Javier, a friend of appellant. Jimenez was conducting an investigation regarding a handgun.

Jimenez knocked on the front door of 6502 Flora, then walked around the back and saw appellant "coming out." Appellant was "outside in the back" and was walking home. Jimenez testified that appellant lived "across the street," and "not at that location." When Jimenez saw appellant, Jimenez immediately ordered him at gunpoint to put his hands above his head. Jimenez testified that he approached appellant, handcuffed him, and "detained" him.[4] Jimenez testified that he did that for "[o]fficer safety; there was outstanding weapon, and I wanted to be secure."

Jimenez escorted appellant via a driveway to the front of the residence where Jimenez's patrol car was parked. When Jimenez handcuffed appellant and escorted him to the patrol car, appellant was not under arrest. During Jimenez's investigation, as he escorted appellant to the patrol car, Jimenez asked him where the handgun was. Appellant was not then under arrest. Jimenez testified that appellant "said that he gave Javier the handgun and he stashed it." Appellant did not state where Javier had stashed the gun. Appellant told Jimenez that Javier had left the location.

Jimenez patted down appellant and placed him in the patrol car. The distance between where Jimenez handcuffed appellant and Jimenez's patrol car was about 50 feet. Another officer went to the garage of 6502 Flora and recovered a handgun, which he gave to Jimenez. Appellant presented no defense evidence.

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[4] This record provides evidence that appellant complied with Jimenez's order that appellant put his hands on his head. The fact that Jimenez handcuffed appellant provides evidence that Jimenez had reholstered his gun by that time.

At the conclusion of the suppression hearing, the court ruled that appellant's statements were not obtained in violation of his *Miranda* rights because, when he made the statements, Jimenez was conducting a gun investigation, and appellant was merely detained and not under arrest.

b. *Analysis*.

Appellant claims he was in custody for purposes of *Miranda* when he was questioned by Jimenez. To determine whether appellant was in custody, we determine whether, "examining all the circumstances regarding the interrogation, there was a '"formal arrest or restraint on freedom of movement" of the degree *associated with a formal arrest*.' (*People v. Stansbury* (1995) 9 Cal.4th 824, 830, italics added.) The only relevant inquiry is how "'a reasonable man in the suspect's shoes would have understood his situation.'" (*Ibid*.)

Appellant concedes he was not formally arrested when Jimenez detained him but claims, in effect, that he was restrained to a degree associated with a formal arrest. We disagree. The fact that appellant was detained did not transmute his detention into a de facto arrest. (*People* v. *Soun* (1995) 34 Cal.App.4th 1499, 1514-1517; *People* v. *Lopez* (1985) 163 Cal.App.3d 602, 608, fn. 3.) Nor did the facts that appellant was initially detained at gunpoint and handcuffed. (*People* v. *Soun*, *supra*, 34 Cal.App.4th at p. 1517.)

Moreover, nothing in the record of the suppression hearing reflects what, if anything, Josefa C. or Rangel told Jimenez, or that Jimenez had probable cause to arrest appellant. There was no suppression hearing evidence that, before or at the time appellant made the statements at issue, Jimenez told appellant that Jimenez had probable

cause to arrest appellant, or that Jimenez told appellant that he was a suspect, in custody, or under arrest. Jimenez's questioning of appellant was brief, nonaccusatory, and occurred outdoors. There was no suppression hearing evidence that Jimenez promised appellant anything for his statement. We conclude appellant was not in custody for purposes of *Miranda* when Jimenez spoke with him.

Further, Jiminez did not tell appellant that appellant had the gun. Jimenez asked appellant where the gun was. Interrogation, for purposes of *Miranda*, consists of words or actions on the part of officers that they should know are reasonably likely to elicit an incriminating response. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1034.) Jimenez was merely conducting a gun investigation and, for all that record reflects, Jimenez may have believed that Javier, not appellant, possessed the gun. Nothing in the record of the suppression hearing evidence reflects that Jimenez's question was reasonably likely to elicit an incriminating response from appellant. (Cf. *People v. Bradford*, *supra*, 14 Cal.4th at p. 1035.) We conclude appellant was not interrogated for purposes of *Miranda*.

Finally, even if appellant was subjected to custodial interrogation, a *Miranda* advisement was not required. Jimenez, who was conducting a gun investigation regarding an "outstanding weapon," asked appellant, a minor, where the gun was. A *Miranda* advisement was not required as to that question, since the public safety exception to the *Miranda* rule applied. (Cf. *People* v. *Simpson* (1998) 65 Cal.App.4th 854, 857-858, 860-861.) In sum, no *Miranda* violation occurred, accordingly, neither appellant's statements nor any product of those statements was obtained in violation of

Miranda. Neither the cases cited by appellant, nor his argument, compels a contrary conclusion.

2. *There Is No Need To Decide The Penal Code Section 654 Issue.*

In the present case, at disposition proceedings on January 15, 2002, the trial court calculated appellant's maximum theoretical period of confinement as three years eight months. Appellant claims the trial court erroneously failed to stay the eight months pursuant to Penal Code section 654. We disagree.

The Penal Code section 654 issue is relevant only to the issue of whether the trial court's order calculating appellant's maximum theoretical period of confinement must be corrected. However, here, the final disposition was that appellant was ordered home on probation. The court did not then order appellant removed from the physical custody of his parents.[5] Only when a court orders a minor removed from the physical custody of his parent or guardian is the court required to specify the maximum term the minor can be held in physical confinement. Accordingly, there is no need to decide the Penal Code

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[5] During the morning proceedings on January 15, 2002, the court expressly ordered that custody of appellant be taken from his parents and guardians, and that he be committed to the care, custody, and control of the probation officer for placement in camp. However, the court later reconsidered its disposition. Thus, during the afternoon proceedings on that date, the court did not expressly order that custody of appellant be taken from his parents and guardians, or that appellant be removed from the physical custody of his parents, but did order that appellant's care, custody, control, and conduct be placed under the supervision of the probation officer, and that appellant be placed home on probation.

section 654 issue. (*In re Joseph G*. (1995) 32 Cal.App.4th 1735, 1743-1744; Welf. & Inst. Code, § 725.)[6]

3. *Remand Is Appropriate To Permit The Trial Court To Comply, As To Count Two, With Welfare And Institutions Code Section 702.*

a. *Pertinent Facts*.

The present offenses of receiving stolen property and possession of a firearm by a minor were alleged as counts one and two, respectively, in a petition filed November 2, 2001.[7] That petition alleged that the offense alleged in count two was a "[f]elony." On January 14, 2002, the court found that appellant committed both offenses and found that the petition was true; the petition was sustained; and the court found that appellant was a person described by Welfare and Institutions Code section 602. On January 15, 2002, the court declared appellant a ward of the court, ordered him placed home on probation, and calculated his maximum theoretical period of confinement as three years eight months.

The January 15, 2002 reporter's transcript does not reflect that the court expressly and orally declared whether the offense alleged in count two was a felony or misdemeanor. The dispositional minute order for that date reflects that the court declared the offense alleged in count two to be a felony, and that appellant's maximum theoretical period of confinement was three years eight months.

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[6] Appellant, citing *In re Joseph G*., *supra*, concedes that "generally, a [Penal Code] section 654 violation will not be corrected when the minor is placed home on probation."

[7] Appellant's contention pertains to count two only.

b. *Analysis*.

A violation of Penal Code section 12101, subd. (a)(1), is punishable by incarceration in state prison or county jail (Pen. Code, § 12101, subds. (a)(1), (c)(1)(C)). Accordingly, the offense is a "wobbler." (Pen. Code, § 17, subd. (b).)

The dispositional minute order reflects that the offense alleged in count two declared a felony, but the reporter's transcript does not reflect that the court expressly and orally declared whether that offense was a felony or misdemeanor. This was error. (*In re Manzy W*. (1997) 14 Cal.4th 1199, 1203-1209; *In re Jorge Q*. (1997) 54 Cal.App.4th 223, 238; see *In re Jose T*. (1997) 58 Cal.App.4th 1218, 1221-1222.) The fact that the January 15, 2002 *minute order* contained notations indicating that the offense alleged in count two was declared a felony, and the fact that that minute order may have reflected a maximum theoretical period of confinement consistent with that offense being a felony, does not compel a contrary conclusion; those expressions are neither oral nor supported by the reporter's transcript. (*In re Manzy W., supra,* 14 Cal.4th at pp. 1207-1208; *In re Jorge Q*., *supra*, 54 Cal.App.4th at p. 238.)

Respondent concedes that remand is appropriate to permit the trial court to expressly and orally declare on the record whether the offense alleged in count two was a felony or misdemeanor. (*In re Manzy W., supra*, 14 Cal.4th at p. 1211; *In re Jorge Q*., *supra*, 54 Cal.App.4th at pp. 238-239; see *In re Jose T*., *supra*, 58 Cal.App.4th at pp. 1221-1222.)[8] We accept the concession. We express no opinion as to which of the

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[8] Moreover, apart from Welfare and Institutions Code section 702, we note that California Rules of Court, rule 1488(e)(5), states that if the court determines "by proof

alternatives, felony or misdemeanor, the offense alleged in count two should be declared to be, nor do we express an opinion concerning what appellant's disposition should be.

4. *The Probation Condition Prohibiting Appellant From Associating With Anyone Disapproved Of By His Parents Or The Probation Officer Was Proper*.

The reporter's transcript of January 15, 2002, reflects that, at disposition on that date, the court ordered appellant, as a condition of probation, "[n]ot to associate with anyone disapproved of by your parents, probation officer."[9] Appellant claims the probation condition should be stricken as overbroad, violative of his liberty, and violative of his right to due process. We disagree. (Cf. *In re Justin S.* (2001) 93 Cal.App.3d 811, 816; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1241-1243.)[10]

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beyond a reasonable doubt in a section 602 matter, that the allegations of the petition are true, the court shall make findings on each of the following, noted in the order: . . . (5) In a section 602 matter, the degree of the offense and whether it would be a misdemeanor or a felony had the offense been committed by an adult. If any offense may be found to be either a felony or a misdemeanor, the court shall consider which description shall apply *and shall expressly declare on the record* that it has made such *consideration*, *and* shall state its determination as to whether the offense is a misdemeanor or a felony. These determinations may be deferred until the disposition hearing." (Italics added; see also California Rules of Court, rule 1493(a)(1).) Since we conclude the trial court erred by failing to expressly and orally declare on the record whether the offense alleged in count two was a felony or misdemeanor, there is no need to reach the issue of whether the trial court further erred in violation of California Rules of Court, rule 1488(e)(5). We are confident that, upon remand, the trial court will fulfill its responsibilities under both Welfare and Institutions Code section 702, and California Rules of Court, rule 1488(e)(5).

[9] The minute order for that date reflects the court ordered, "Do not associate with . . . anyone disapproved of by . . . parents . . . probation officer."

[10] Appellant claims the condition prohibits him from associating with anyone "not approved" of by his parents or the probation officer, suggesting that the condition would thus require appellant's parents and the probation officer to approve appellant's association with "grocery clerks, mail carriers, health care providers, and any other individuals with whom the minor might have contact." However, the probation condition

DISPOSITION

The order of wardship is affirmed, except that the case is remanded to permit the trial court to comply with Welfare and Institutions Code section 702, as to the offense alleged in count two, and for further proceedings consistent with this opinion.

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CROSKEY, Acting P. J.

We concur:

KITCHING, J.

ALDRICH, J.

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in the present case did not merely refer to someone of whom appellant's parents or the probation officer failed to approve, but someone of whom his parents or the probation officer affirmatively disapproved. This distinguishes the present case from *In re Kacy S.* (1998) 68 Cal.App.4th 704, 712-713, cited by appellant.